

FEDERAL COURT OF AUSTRALIA

Huang v Minister for Immigration and Border Protection [2015] FCA 792

Citation: Huang v Minister for Immigration and Border Protection [2015] FCA 792

Appeal from: Application for leave to appeal: Huang v Minister for Immigration and Border Protection [2015] FCCA 496

Parties: **LING HUANG and XIANGHUI ZHENG v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL**

File number: NSD 249 of 2015

Judge: **FARRELL J**

Date of judgment: 5 August 2015

Catchwords: **MIGRATION** – application for leave to appeal – decision of Federal Circuit Court dismissing application for judicial review – decision of Migration Review Tribunal affirming decision of delegate of Minister not to issue student visa

Legislation: *Federal Circuit Court Rules 2001* (Cth) r 44.12
Federal Court of Australia Act 1976 (Cth) s 24(1A)
Migration Act 1958 (Cth) s 97
Migration Regulations 1994 (Cth) Sch 2 cl 572.224, Sch 4 Pt 1 criterion 4020

Cases cited: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397
Huang v Minister for Immigration and Border Protection [2015] FCCA 496
Patel v Minister for Immigration and Border Protection [2015] FCAFC 22
Trivedi v Minister for Immigration and Border Protection (2014) 220 FCR 169; [2014] FCAFC 42

Date of hearing: 4 August 2015

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 38

Counsel for the First Applicant:	The first applicant appeared in person with the assistance of an interpreter
Counsel for the Second Applicant:	The second applicant did not appear
Solicitor for the First Respondent:	Ms A Carr of DLA Piper Australia
Counsel for the Second Respondent:	The second respondent submitted save as to costs

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 249 of 2015

**BETWEEN: LING HUANG
First Applicant**

**XIANGHUI ZHENG
Second Applicant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent**

JUDGE: FARRELL J

DATE OF ORDER: 5 AUGUST 2015

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. 1. The name of the second respondent be changed so as to read “Administrative Appeals Tribunal”.
2. 2. The application be dismissed.
3. 3. The applicants pay the first respondent’s costs, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 249 of 2015

**BETWEEN: LING HUANG
First Applicant**

**XIANGHUI ZHENG
Second Applicant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent**

JUDGE: FARRELL J

DATE: 5 AUGUST 2015

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 1 This is an application for leave to appeal from a judgment of the Federal
Circuit Court of Australia delivered on 5 March 2015: see *Huang v Minister for Immigration
and Border Protection* [2015] FCCA 496 (“*Huang*”). The primary judge dismissed, pursuant
to r 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), an application for judicial
review of a decision of the Migration Review Tribunal to affirm a decision of the Minister’s
delegate made on 28 May 2012. The Tribunal advised the applicants of its decision by way of
a Statement of Decision and Reasons dated 23 May 2014 (“Decision Record”).

2 2 The Minister made an application to amend the name of the second respondent
to “Administrative Appeals Tribunal”. I granted that application.

BACKGROUND

3 3 The background material is derived from the Tribunal’s Decision Record at
[8].

4 4 The applicants are citizens of the People’s Republic of China, and are husband
and wife. Ms Huang arrived in Australia on 21 November 2009 on a Student (Class TU)

Subclass 572 visa, which ceased on 15 March 2012. Ms Huang applied for a second Student (Class TU) Subclass 572 visa on 9 March 2012. Mr Zheng's visa applications were as a member of Ms Huang's family group.

5 On 15 March 2015, the Minister's Department wrote to Ms Huang requesting further information including evidence that she met the English language proficiency requirement. On 3 April 2012, Ms Huang provided to the Department a copy of a Certificate of Diploma of Hospitality from Evolution Systems for Training & Development dated 17 February 2012 ("certificate") as evidence that she met the requirement.

6 On 5 April 2012, the Department wrote to Ms Huang in relation to information gathered by the Department to the effect that Evolution Systems for Training & Development had not in fact awarded the diploma, and invited her to comment on the suspected "non-genuine" information and documentation supplied by her and to indicate any compelling or compassionate reasons as to why the requirements of Public Interest Criterion ("PIC") 4020 should be waived.

7 On 30 April 2012, Ms Huang responded to the Department. Ms Huang's response said:

- • She obtained the Certificate of Diploma of Hospitality from Evolution Systems for Training & Development from her previous Migration Agent, Mr Jackie Chang.
- • She first contacted this agent around September 2011 as she wanted to transfer to another school and he told her that he could help her transfer to Evolution Systems for Training & Development and she only had to pay the tuition fees to the school and that she did not need to attend class.
- • She transferred \$1,700 to this agent's account and on the same day received a Confirmation of Enrolment to study at Evolution Systems for Training & Development. In November 2011 after she registered at the school, she asked this agent if she needed to attend classes and he told her that she did not.
- • When she contacted the agent around February 2012 saying she needed a certificate from the school in order to extend her Student visa, he told her he could get a certificate for her but she would have to pay \$3,000 for new tuition fees, which she paid and received the certificate two weeks later.
- • The applicant stated that as she believed the certificate was genuine and had been issued by Evolution Systems for Training & Development she provided it to her registered migration agent to submit to the department in support of her Student visa application.

- - Although Mr Chang told her there must have been a mistake in the system when she contacted him about the suspected fraudulent document, the applicant stated that she believed ‘the department’s information [was] correct’ and that ‘Mr Jackie cheated [her] and provided the false documents to [her]’.
 -
- - When she received the Department’s request to comment on the suspected ‘non-genuine’ information and documentation she ‘felt really shocked’. She said she regretted doing ‘this kind of stupid things’ and agreed to assist the department with any investigations into the alleged fraud and illegal activities.

8 8 The Minister’s delegate refused to grant the visas.

TRIBUNAL DECISION

9 9 The applicants applied to the Tribunal for review of the delegate’s decision on 14 June 2012.

10 10 In accordance with cl 572.224 of Schedule 2 of the *Migration Regulations 1994* (Cth), the Tribunal had to determine whether Ms Huang satisfied PIC 4020, and if not, whether the requirements of PIC 4020(1) and (2) should be waived under PIC 4020(4).

11 11 PIC 4020 and the definition of “bogus document” then contained in s 97 of the *Migration Act 1958* (Cth) were set out in the attachment to the Decision Record. PIC 4020 relevantly provided as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
 - (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the application;

the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

- ...
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: Regulation 1.03 defines bogus document as having the same meaning as in section 97 of the Act.

12 12 “Bogus document” was defined in s 97 of the Migration Act as follows:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

13 13 The applicants attended the Tribunal hearing on 22 May 2014 with the assistance of an interpreter and they were represented in relation to the review (including at the hearing) by their migration agent, who was not Mr Jackie Chang: Decision Record at [3].

14 14 Before the hearing, on 16 and 21 May 2014, Ms Huang’s migration agent provided a submission and supporting documents. At [9], the Decision Record states that:

... [The submission] confirmed that the applicant had submitted a certificate from Evolution System to satisfy the English requirement for her student visa application that was later found to be fraudulent. Significantly, the submission stated:

- • ‘It is not in dispute that the certificate which Ms Huang submitted to the Department of Immigration was a bogus document’.
- • The applicant realised the mistake she made in submitting the bogus documents.
- • She sincerely apologised for submitting bogus certificates as her English proficiency evidence to the Department and has ‘no doubt made a mistake’.
- • She is endeavouring to mitigate her mistake and is extremely keen to complete her further studies in Australia as completing her studies is vital in her future career.
- • Her further study will encourage the Australian education market, as well as the Australian economy in general.
- • Documents submitted included a Certificate indicating she had completed a Diploma in Management in 2012; records of money transfers from her parents in China; her application to study for a Master of Business Administration Degree; confirmation of a booking for an IELTS test; and a letter of offer from Holmes Institute Master of Business Administration Degree.

15 15 The Tribunal found that Ms Huang had provided, or caused to be provided, a “bogus document” and “information that is false or misleading in a material particular” to the Department in respect of her visa application. Therefore, she did not meet PIC 4020(1): Decision Record at [12]-[13].

16 16 Further, although the Tribunal accepted that, as a fee paying student, Ms Huang may bring value to the Australian education market and that both applicants had contributed to the Australian economy as consumers and (in Mr Zheng’s case) as a taxpayer, the Tribunal did not consider that those factors rose to the level of compelling or compassionate circumstances which would justify the grant of a visa. The Tribunal therefore decided that the requirements of PIC 4020(1) should not be waived: Decision Record at [17]-[19].

17 17 The Tribunal found that Ms Huang (and Mr Zheng as a member of her family unit) did not satisfy PIC 4020 and therefore did not meet the secondary criteria for grant of a visa. The Tribunal affirmed the delegate’s decision.

FEDERAL CIRCUIT COURT DECISION

18 18 The applicants applied for judicial review of the Tribunal's decision in the Federal Circuit Court by an application filed on 25 June 2014. The primary judge convened a show cause hearing pursuant to r 44.12(1)(a) of the Federal Circuit Court Rules.

19 19 The applicants listed three grounds in their application (as written):

1. The visa refusal is an unfair decision.
2. I should not be solely responsible for all consequences associated with providing bogus documents to the Department of Immigration.
3. The decision maker should consider all aspects of my case.

20 20 The primary judge determined from Ms Huang's oral submissions that there was an overlap between grounds one and two, because she explained the unfairness about which she was complaining to be a lack of proper consideration of her circumstances by the Tribunal. The primary judge was not satisfied that this was a case where the agent had perpetrated a fraud against the Tribunal so as to disable its review function. He relied on two decisions of the Full Court of this Court for the proposition that although there must be an element of fraud or deception to engage the operation of PIC 4020 it is unnecessary that the applicant was knowing or complicit in the deceptive character of the information furnished: see *Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169; [2014] FCAFC 42 ("*Trivedi*") and *Patel v Minister for Immigration and Border Protection* [2015] FCAFC 22: see *Huang* [19]-[21].

21 21 In relation to ground three, in oral submissions Ms Huang identified that it was the contribution which she and Mr Zheng made to Australian society which was overlooked by the Tribunal. The primary judge rejected this submission because the Tribunal referred to their contributions in relation to whether it should waive the requirements of PIC 4020: see *Huang* [22]. The primary judge also found that the Tribunal had applied the correct law in assessing whether Ms Huang met PIC 4020: see *Huang* [24]-[27]. Finally, the primary judge found that it was open to the Tribunal to find on the material before it and for the reasons it gave that the requirements of PIC 4020(1) should not be waived: see *Huang* [28]-[29].

22 22 In the result, the primary judge held that the applicants had failed to demonstrate an arguable case of jurisdictional error by the Tribunal and therefore he dismissed the application.

APPLICATION TO THIS COURT

23 23 The applicants filed an application for leave to appeal and a draft notice of appeal on 18 March 2015. There are two grounds listed in the application and draft notice:

1. The decision was unfair.
2. The Court failed to fully consider the circumstances of the Applicant.

24 24 The primary judge's judgment is interlocutory in nature: r 44.12(2) of the Federal Circuit Court Rules. Therefore, the applicant requires leave to appeal to this Court: s 24(1A), *Federal Court of Australia Act 1976* (Cth).

25 25 Leave to appeal from an interlocutory judgment requires the applicant to show that there is sufficient doubt as to the correctness of the judgment below, and further that, if the judgment below is assumed to be wrong, substantial injustice would be suffered by the applicant if leave to appeal were refused: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397.

26 26 The Minister submitted that leave to appeal should be refused because there is no merit in the proposed grounds of appeal.

27 27 The applicant filed no written submissions. She provided oral submission in support of her application at the hearing, at which she appeared with the assistance of an interpreter. Ms Huang advised the Court that Mr Zheng was aware of the hearing and that she would make submissions on their behalf.

Ground 1

28 28 Ms Huang explained that, by this ground, she meant that PIC 4020 is unfair; that she should not be "held responsible" for a false document of whose falsity she was not aware and which she still finds hard to believe. She said that she had studied at another school and almost completed that course, but because of the expense she told Mr Chang that she would like to transfer and it is in that context that Mr Chang told her that she would need to pay fees for tuition at Evolution Systems for Training & Development but need not attend classes.

29 29 Ms Huang said that she could not prove the truth of her contentions because she could not discover Mr Chang's whereabouts at the time of the Tribunal hearing so that he could give evidence. She said that she did have an audio recording of their conversations and

their visit to Evolution Systems for Training & Development but the Tribunal had refused to receive it. She said that her migration agent had had the audio recording transcribed by a NAATI accredited interpreter before the Tribunal hearing, but said she did not seek to submit this in evidence.

30 30 Ms Huang submitted that she did not raise the question of whether the Tribunal refused to receive evidence from her (being the alleged recordings) before the primary judge. She said she did not do this because of advice from lawyers that it would not be admissible but thought that it was “worth a go” before this Court. She did not submit in evidence a transcript of the Tribunal hearing in support of her claims and there is nothing in the otherwise comprehensive reasons of the Tribunal which indicates that Ms Huang sought to submit evidence of recordings. It is difficult to understand why her migration agent who appeared with her before the Tribunal would not have sought to submit a transcript of the audio recordings if the agent had such a transcript having regard to the documents referred to as being submitted before the hearing as set out in the Decision Record at [9].

31 31 I am not satisfied that Ms Huang did seek to submit evidence of an audio recording at the Tribunal hearing, but nothing ultimately turns on this point. Ms Huang’s submissions appear to be directed to a concern that the Tribunal did not believe her evidence that she did not know that the certificate provided to her by Mr Chang was not genuine. From my reading of the Tribunal’s reasons, the Tribunal acted on the basis that it did not matter whether Ms Huang knew that the certificate was not genuine. Ms Huang accepted that the certificate was not genuine, as emerges from the Decision Record at [8]-[9]. At the Tribunal hearing, Ms Huang confirmed that the material in [8] of the Decision Record was a fair representation of what transpired during the Department’s processing of her application, she apologised and said that she thought the document she gave the Department was a “true document” and only realised after getting the Department’s letter that it was not: Decision Record at [10].

32 32 Notwithstanding the factual matters raised by Ms Huang, I accept that the Tribunal made its decision with reference to the interpretation of PIC 4020 which the Tribunal, the primary judge and this Court are bound to apply having regard to the decisions of the Full Court cited by the primary judge in *Huang* at [21]; that is, although an element of fraud or deception was necessary to attract the operation of PIC 4020, it was unnecessary that Ms Huang be knowing or complicit in the deceptive character of the bogus document. I

accept that the Tribunal correctly set out the law regarding PIC 4020 in the Decision Record at [7] and in the Attachment and made findings that were reasonably open to it to make on the material and evidence before it and for the reasons it gave. There is no appellable error disclosed in the primary judge's reasons in *Huang* at [21] and [24]-[27].

Ground 2

33 The Minister noted that ground 2 is unparticularised.

34 In her oral submissions Ms Huang submitted the Tribunal failed to consider that she was not the person who made the false document; she did not know it was false and she should not be held responsible for it. This again raises the policy of PIC 4020. In *Trivedi* at [43] and [49], Buchanan J pointed out that it would impose an impossible task for those administering the visa system if it were required of them to demonstrate that the applicant was knowingly complicit in the preparation of the bogus document and it is not inconsistent with coherent public policy that the applicant be ultimately responsible for purposefully untrue documents provided with a visa application.

35 This complaint was considered by the primary judge in *Huang* at [20] and [24]-[27]. I perceive no appellable error in his approach.

36 Ms Huang also complained that neither the Tribunal nor the primary judge accepted that the applicants' contributions through paying fees, spending money on necessities and paying tax were sufficient contributions to ground a waiver of PIC 4020 under PIC 4020(4). While those things can properly be described as economic benefits to Australia, I agree with the primary judge in *Huang* at [29] that it was open to the Tribunal to find on the material and evidence before it that these were not compelling circumstances that affected the interests of Australia and it is difficult to see how they could ever answer the description of compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

CONCLUSION

37 I have read carefully both the Decision Record and the primary judge's reasons in *Huang*. I agree with the Minister that the proposed grounds of appeal are without merit. The Tribunal set out the law relating to PIC 4020 correctly; found that PIC 4020(1) had not been satisfied on the evidence before it; and decided that the circumstances did not warrant waiver of PIC 4020. Those findings were open to it to make on the material before it.

There is no jurisdictional error identified by the applicants or apparent on the face of the Decision Record. The applicants have not pointed out any appellable error by the primary judge nor do I perceive any in his reasoning.

38 38 The application should be dismissed. I will order that the applicants pay the first respondent's costs as agreed or taxed.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell.

Associate:

Dated: 5 August 2015